

e-filed 8/1/08

NOT FOR CITATION
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SUSAN SANDELMAN, AS TRUSTEE OF
THE ESAN TRUST,

No. C08-00681 HRL

Plaintiff,

**ORDER DENYING PLAINTIFF'S
APPLICATION FOR JUDGMENT**

v.

[Re: Docket No. 27]

B&B PROPERTY MANAGEMENT, LLC, dba
BELLACH'S LEATHER FOR LIVING,

Defendant.

The plaintiff has secured entry of defendant's default in this matter, and defendant's motion to set it aside has been denied¹ For the background of this case, see the court's order, filed today, denying the defendant's motion. Plaintiff now moves for entry of judgment.

I. LEGAL STANDARD

Fed. R. Civ. P. 55(b)(1) allows the entry of judgment by default "upon request of the plaintiff and upon affidavit of the amount due . . . if the defendant has been defaulted for failure to appear and is not an infant or incompetent person."²

¹ Pursuant to 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73, all parties who have appeared in this action have expressly consented that all proceedings may be heard and finally adjudicated by the undersigned.

² There is no contention that the corporate defendant is an "incompetent person."

II. DISCUSSION

Plaintiff has provided a draft order and default judgment for a money judgment of unpaid principal and interest on the Promissory Note, attorney's fees, and costs. It does not include recovery of the property under the Leasehold Deed of Trust or foreclosure under the Subordinated Deed of Trust.

However, the court noted that the Promissory Note, page two, Limitation on Recourse, seems to preclude plaintiff's request for unpaid principal and interest:

If default occurs . . . *any judicial proceedings brought by Lender [plaintiff] against Borrower [B&B] shall be limited* to the preservation, enforcement and foreclosure of the liens, mortgages, assignments, rights and security interests now or at any time hereafter securing the payment hereof, and no attachment, execution or other writ or process shall be sought, issued or levied upon any assets, properties or funds of Borrower, other than the Property described in any instrument securing payment of this Note. . . *no judgment for any deficiency upon such indebtedness, sums and amounts shall be sought or obtained by Lender against Borrower.*

(emphasis added)

At the hearing, plaintiff was unable to explain how, in light of this section, it was entitled to judgment for the unpaid amounts. Plaintiff's motion does not address this provision.

III. ORDER

For this reason, IT IS ORDERED THAT plaintiff's application for judgment is DENIED without prejudice. With respect to any renewed application, plaintiff shall submit (with Points and Authorities, if appropriate) a proposed judgment that describes specifically and in detail the relief she is entitled to under the Note, the Subordinated Deed of Trust, and the Leasehold Deed of Trust.

Dated: 8/1/08



HOWARD R. LLOYD
UNITED STATES MAGISTRATE JUDGE

Notice will be electronically mailed to:

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Counsel are responsible for distributing copies of this document to co-counsel who have not registered for e-filing under the court's CM/ECF program.

Dated: 8/1/08

mpk
Chambers of Magistrate Judge Lloyd